SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-440

GREAT SOUTHWEST WAREHOUSES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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28 U.S.C. 1254(1) 2

IN THE

Supreme Court of the United States

October Term, 1971

No.

GREAT SOUTHWEST WAREHOUSES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Great Southwest Warehouses, Inc. petitions for a writ of certiorari to review the judgment, decision and order of the Court of Appeals for the Fifth Circuit enforcing an order of the National Labor Relations Board which set aside an election conducted on March 31, 1969, and ordered the conducting of a second election at such time as the Regional Director deemed appropriate, and required Petitioner to offer full reinstatement to an employee to his former or substantially equivalent position and to make him whole for his loss of earnings and to post appropriate notices.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is No. 71-1128 of the Fifth Circuit Court of Appeals, decided May 11, 1971. Judgment was entered on June 2, 1971 (Appendix B). The findings of fact, conclusions of law, and order of the Board are attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1971. A petition for rehearing was filed under Rule 40 of the Federal Rules of Appellate Procedure, and an order denying the petition for rehearing was entered June 29, 1971. Jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

(1) Does there exist a real conflict between two Circuit Courts of Appeals as to what is the proper application of the substantial evidence rule as laid down by this Court in *Universal Camera*?

(2) Did the Court grossly misapply the rule as laid down by this Court in *Universal Camera* that, in order to grant enforcement of a Board order, the record as a whole must be supported by substantial evidence?

(3) Has the Court abandoned its duty of fair review of National Labor Relations Board decisions with the effect of permitting Administration dictatorship and thereby denying Petitioner the right of a fair tribunal and due process?

STATUTE INVOLVED

The relevant provisions of the Administrative Procedure Act (5 U.S.C. Sec. 557, 706). (See Appendix D.)

STATEMENT OF THE CASE

A. The Trial Examiner's Findings of Fact:

The National Labor Relations Board found that Petitioner was engaged in a business affecting interstate commerce in the storage and handling of goods transported to its Dallas warehouse directly from points outside the State of Texas. The Union, General Drivers, Warehousemen and Helpers, Local Union No. 745, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was found to be a labor organization within the purview of Section 2(5) of the Act. The Union had filed a petition for representation on or about August 20, 1969, and an election was conducted on October 31, 1969. On November 5, the Union filed objections to conduct affecting the results of the election and also filed original charge of unfair labor practice, both filings relating to the alleged discriminatory discharge on October 10 of employee John S. Wilson. A hearing was held on February 4, 1970, concerning the unfair labor practice charges, and Petitioner defended on the basis that Wilson was discharged for participation in uniawful threats in the course of concerted union activities. The question narrowed down to whether Wilson was or was not guilty of the alleged unprotected union activity. If he was guilty of such threats, then the company was justified in discharging him; but, if he was not guilty of such threats, then, even if the Petitioner acted in good faith, it was still guilty of an unfair labor practice under *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U.S. 21.

At the hearing, three other employees of Petitioner testified that Wilson had threatened or intimidated them about joining the union. Johnnie Davis, Sr., a warehouse packer and crater with 23 years' of service with the company, testified that before the election, Wilson had told him on three different occasions that if he did not join the union he would have no job and that his new pickup would

be splashed with paint. Mrs. Evelyn Jane McKim, a cannery packer whose husband had left her and their four children during the union campaign, testified that a week before his discharge, Wilson had asked her why she had failed to attend a union meeting and when she indicated her lack of interest in the union, told her that the union was coming into the company and that no one would work with her and the company would be forced to release her. Jerry Thomas, who testified that he had told Wilson of his opposition to the union, said that three weeks before Wilson's discharge, Wilson had told him at work that if he did not vote for the union, the union members would get even with him when he came to work and make things so hard for him that he would have to quit. All three also testified that they had told the company dispatcher, Wendell Fish, about these threats.

The Trial Examiner in his opinion, noted that Wilson generally denied threatening anyone and specifically denied the charges of Davis and McKim. On this basis he credited Wilson in his denials, justifying such crediting on Wilson's demeanor on the stand and on his opinion that Wilson had a character which would be totally inconsistent with the accusations leveled against him by the other witnesses. The Trial Examiner generally credited the witnesses' accounts of threats, and only credited Wilson's denials of impropriety in his solicitations for the union.

B. The Board's Findings, Conclusions and Order

The Board, finding that no prejudicial error was committed, adopted in toto the findings, conclusions and recommendations of the Trial Examiner in sustaining the Trial Examiner's decision that Petitioner was guilty of an unfair labor practice under Section 8(a)(1) of the Alaska Labor Relations Act, the Board ordered that the election held on October 31, 1947, be set aside and that the case

be remanded to the Regional Director to conduct a new election when he deemed that the circumstances permitted the free choice of a bargaining representative. The Board also upheld the Trial Examiner's decision that Petitioner be ordered to cease and desist from committing such unfair labor practices and that full reinstatement with backpay be offered to Wilson.

C. The Decision of the Court of Appeals:

The United States Court of Appeals for the Fifth Circuit reviewed the Board order under the authority of Section 10(f) of the Labor-Management Relations Act, 29 USC Sec. 160(f). In a *per curiam* decision, the Court enforced all aspects of the Board order.

ARGUMENT

At the outset of this Brief, Petitioner concedes that the Circuit Courts of Appeals and not the Supreme Court has the function of reviewing orders of the National Labor Relations Board. However, this Court has said that it will intervene and grant certiorari when the standard of review appears to have been misapprehended or grossly misapplied [*N.L.R.B.* v. *Walton Mfg. Co.*, 82 S.Ct. 853, 369 U.S. 404, 7 L.ed 2d 829 (1962)], when principles of importance to the public are involved and there is a real conflict of opinion between the Circuit Courts of Appeals [*N.L.R.B.* v. *Pittsburg S. S. Co.*, 71 S.Ct. 453, 340 U.S. 498, 95 L.Ed 479 (1951)], and where a Circuit Court of Appeals has abused its judicial discretion [*N.L.R.B.* v. *Indiana and Michigan Electric Co.*, 63 S.Ct. 394, 318 U.S. 9, 97 L.Ed. 579 (1943)]. Petitioner, relying upon the above-cited authorities, contends and will show in the remainder of this brief that the case at bar presents a situation where the granting of a writ of certiorari is not only proper, but

necessary in order to afford Petitioner due process and the right of a fair tribunal.

I.

In accepting the Board's decision and granting enforcement of the Board's order, the Fifth Circuit has clearly shown that a conflict exists, not only between this case and earlier Fifth Circuit decisions, but also with another Circuit Court of Appeals. In *N.L.R.B.* v. *Cosco Products Co.*, 280 F.2d 905 (5th Cir., 1960), the Fifth Circuit commented at the outset of its decision that where the facts are not complicated and generally not in serious dispute, still, where they are in dispute, "*the wholesale resolution by the Examiner in favor of Board witnesses and the Board's equally wholesale adoption of the resolution . . . are as injudicial as they are unjudicial, and indefensible as they are surprising*". (Emphasis in original.) In an earlier case, the Fifth Circuit, in discussing the question of discrediting testimony, was prompted to say that all evidence in the record cannot casually be eliminated by the simple expedience of "discrediting" Respondent's witnesses. [*N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 222 F.2d 341 (5th Cir.)]. The Court found that such action by the Trial Examiner of uniformly crediting the General Counsel's evidence, and discrediting all of respondent's, whether or not the latter was contradicted or corroborated, exhibited a degree of bias.

In the case at bar, the Trial Examiner's findings, upon which enforcement was granted by the Fifth Circuit, credited entirely the testimony of a prejudiced witness in the face of the testimony of three disinterested witnesses. The Sixth Circuit Court of Appeals in *N.L.R.B.* v. *Mt. Vernon Telephone Corp.*, 352 F.2d 977 (6th Cir., 1965), found in crediting a prejudiced witness "on the basis of demeanor" to be an improper basis for the crediting of

testimony and subject to reversal. This split in thinking between the Fifth Circuit Court of Appeals and Sixth Circuit Court of Appeals as to what constitutes substantial evidence on the whole record is further exemplified in a case with a fact situation very similar to the case at bar.

In *N.L.R.B.* v. *Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir., 1964), the Court was reviewing a Board decision which had found that a discharge of an employee was an unfair labor practice because the discharge extended from a protected union activity. The issue before the reviewing court was whether the employee was fired for union activity or whether she gave notice of leaving and therefore that the company was justified in hiring a replacement for her. The Trial Examiner in his fact findings credited the employee's testimony entirely, and discredited the testimony of company witnesses who were all on a managerial or supervisory level. The Court denied enforcement of the Board order on the basis that the record showed that the employee was a highly interested and prejudiced witness, not only because she was the prime mover behind the unionization campaign, but also because she would be the beneficiary of backpay if awarded. The Court also found it significant that the General Counsel relied almost solely upon the testimony of this interested witness to prove the unfair labor practice.

A cursory examination of the record in the case at bar reveals that the facts are very similar to the above-mentioned case, except that the record in the present case shows even a stronger justification for the discharge of the employee Wilson. The General Counsel in the case at bar relied not almost solely, but entirely, on the testimony of the prejudiced witness in the face of the testimony of three disinterested persons who, like Wilson, were not on any supervisory or managerial level. The record further shows that Wilson did not even specifically deny one of the

witnesses' testimony, but only testified generally that he did not threaten anyone.

The Trial Examiner justified his findings on the basis of demeanor, which the Sixth Circuit has determined to be a questionable basis for crediting, and that the character of Wilson was one of a truthful man. Petitioner contends that if the Trial Examiner's findings must be supported by substantial evidence on the record, as this Court has directed, then his findings cannot stand since the *only* evidence in the record concerning Wilson's character is that which was offered by the other three witnesses. Their testimony certainly does not reveal Wilson's character as that of a truthful man.

Petitioner contends that a comparison of the record of the case at bar and of the Sixth Circuit decision of *N.L.R.B.* v. *Elias Bros. Big Boy, Inc.* permit only one conclusion. The conclusion is that although both courts may profess to apply the substantial evidence rule, as this Court has directed, the rule or test is, in fact, not being applied uniformly or in the same way by both Courts as evidenced by the decisions handed down.

II.

Since the Fifth Circuit Court of Appeals in a *per curiam* decision granted enforcement of the Board's order, the Petitioner assumes that the Fifth Circuit found that the Board's findings and decision were based on substantial evidence on the record as a whole. Therefore, in attacking the Court's order of enforcement, Petitioner is in effect contending that the Board has grossly misapplied the substantial evidence rule by basing its decision *in toto* on the findings of the Trial Examiner.

This Court in *Universal Camera,* 71 S.Ct. 456, 340 U.S. 474, 95 L.Ed. 456 (1951), determined that the

substantial evidence test to be used by the National Labor Relations Board and reviewing courts is the test which prevails in the Administrative Procedure Act. This test is that fact questions must be supported by substantial evidence "on the record considered as a whole". "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the requirement in both statutes that courts consider the whole record." (P. 488.) The Court went on further to say that Trial Examiners' findings should not be "given more weight than in the reason and in the light of judicial experience they deserve." (P. 497). If the standard of substantial evidence "appears to have been misapprehended or grossly misapplied" (P. 491), then this Court will intervene.

Petitioner contends that the Fifth Circuit grossly misapplied the substantial evidence test by granting enforcement of the Board's decision which adopted the Trial Examiner's findings. The Trial Examiner in his findings and conclusions discredited the unimpeached testimony of three disinterested persons, and credited entirely the self-serving testimony of General Counsel's *only* witness, who was an interested witness since he was subject to backpay and was self-admittedly the prime mover behind union organization. The Trial Examiner credited the testimony of this witness on the basis that this witness impressed the Trial Examiner "not only as that of a truthful witness, but as one whose character would be totally inconsistent with the accusations leveled against him" by the other witnesses. The testimony of the three employees, who testified that Wilson threatened and intimidated them about joining the union, was dismissed with the statement "I do not believe their accounts of threats". No other reason was given by the Trial Examiner for his uniform crediting of the one witness, even though he observed that General Counsel's witness did not even specifically deny the testimony of one of the three witnesses.

Petitioner feels that an examination of the record reveals that the relevant evidence in the record is so overwhelmingly opposed to such findings that only one conclusion could be reached. The conclusion is that the trial Examiner and Boar' have grossly misapplied the substantial evidence rule by failing to consider that part of the record which fairly detracts from their findings and decisions. The Fifth Circuit, by granting enforcement in a *per curiam* decision, and thereby stamping its approval on the Board's decision, has compounded this error, and has failed to follow both the law as laid down by this Court in *Universal Camera*, and the statutory dictates of 5 U.S.C. Sec. 706 of the Administrative Procedure Act.

III.

The importance of the issue involved here is that if the Circuit Courts of Appeals are allowed to rubber-stamp Board decisions which are based on insufficient evidence and reasoning of Trial Examiner's findings, then the effect of this is that the substantial evidence rule will be applied in a discriminatory manner and the parties in such litigation will be deprived of the right of due process and a fair tribunal. This Court has found in its *Universal Camera* decision that the National Labor Relations Board is to be guided by the dictates of the Administrative Procedure Act.

Congress has specifically outlined in the Administrative Procedure Act, Title V, U.S.C.A. Sec. 557, that "all decisions . . . are a part of the record and shall include a statement of (a) findings and conclusions and the reasons or basis thereof on all material issues of fact, law, or discretions presented on the record." The Board in the case at bar has accepted *in toto* the findings and reasonings of the Trial Examiner. Petitioner contends that the findings and reasons of the Trial Examiner are entirely without

justification in that the Trial Examiner credits the testimony of only one witness on the basis of demeanor and character. Crediting testimony on the basis of demeanor only is, to say the least, questionable, especially in the face of the unimpeached testimony of three disinterested witnesses. To credit a witness' testimony on his character where, as here, the only evidence in the record of Wilson's character is that given by the other three witnesses, is a flagrant violation of the Trial Examiner's duties to make his findings in a judicial manner based on substantial evidence *on the record*, and not on personal whims or opinion.

The Administrative Procedure Act also provides in Title V, U.S.C.A. Sec. 706, that the reviewing court *shall* "(2) hold unlawful and set aside agency actions, findings, and conclusions found to be (a) arbitrary and capricious and abuse of discretion or otherwise not in accordance with the law; (e) unsupported by substantial evidence . . ." The language of the Act is mandatory and where, as here, the reviewing court enforces injudicial Board decisions, it is without a doubt depriving Petitioner of this right to a fair tribunal given to him by Congress and entrusted to the reviewing courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1128
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

GREAT SOUTHWEST WAREHOUSES, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

May 11, 1971

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21.[1]

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*Rule 18, 5th Cir.; *See Isbel Enterprises, Inc. v. Citizens Casualty Co. of New York, et al,* 5th Cir. 1970, 431 F.2d 409, Part I.

[1]*See NLRB v. Amalgamated Clothing Workers of America,* 5th Cir. 1970, 430 F.2d 966.

Adm. Office, U.S. Courts–Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*	)	
v.	)	No. 71-1128
GREAT SOUTHWEST WAREHOUSES, INC., *Respondent.*	)	

JUDGMENT

Before: THORNBERRY, MORGAN and CLARK, Circuit Judges.

THIS CASE was submitted upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Great Southwest Warehouses, Inc., its officers, agents, successors, and assigns. The Court having carefully considered the briefs and transcript of record filed in this case, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on May 11, 1971, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, Great Southwest Warehouses, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: June 2, 1971

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GREAT SOUTHWEST WAREHOUSES, INC.

and

Cases 16-CA-3794
16-RC-5277

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 745, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On April 3, 1970, Trial Examiner William J. Brown issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that certain conduct of the Respondent had interfered with the election held on October 31, 1969 in Case 16-RC-5277, and recommended that the election be set aside and a second election held. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision with a supporting brief, and the Charging Party filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, Great Southwest Warehouses, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[2]

---

[1] Respondent's exceptions are directed to the credibility resolutions of the Trial Examiner and are without merit. The Board will not overrule the Trial Examiner's resolutions as to credibility unless a clear preponderance of all relevent evidence convinces us that they are incorrect. On the entire record, such a conclusion is not warranted herein. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

[2] Modify paragraph 2(a) of the Recommended Order to read as follows:

> Offer to John S. Wilson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed and make him whole for any loss of pay he may have suffered as a result of the discrimination against him, in the manner set forth in the section herein entitled 'The Remedy.'

(Footnote continued on next page)

IT IS FURTHER ORDERED that the election held on October 31, 1969, among the employees in the designated unit at Great Southwest Warehouses, Inc., Dallas, Texas, be, and it hereby is, set aside, and that said case be, and it hereby is, remanded to the Regional Director for Region 16 to conduct a new election when he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate The Regional Director for Region 16 shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employee engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person

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(Footnote two continued from page A-2)

Modify the second indented paragraph of the Notice to read as follows:

> WE WILL offer to JOHN S. WILSON immediate and full reinstatement to his former job or, if that job no longer exists, to a substantial equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as a result of the discrimination against him.

at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[3] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by General Drivers, Warehousemen and Helpers, Local Union 745, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Dated, Washington, D.C. June 19, 1970.

Frank W. McCulloch, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759. Accordingly it is hereby directed that an election eligibility list, containing the names and addresses of all eligible voters, must be filed by the Employer with the Regional Director for Region 16 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

TXD-195-70
Dallas, Tex.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

GREAT SOUTHWEST WAREHOUSES, INC.

and

Case No. 16-CA-3794
16-RC-5277

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 745, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Billy R. Snow, Esq., Fort Worth, Tex., for the General Counsel.

G. William Baab, Esq., (Messrs. Mullinax, Wells, Mauzy & Collins) Dallas, Tex., for the Charging Party and Petitioner.

Michael J. Kuper, Esq., and *Allen P. Schoolfield, Jr., Esq. (Messrs. Schoolfield & Smith)* Dallas, Tex., for the Respondent and Employer.

Before: WILLIAM J. BROWN, Trial Examiner

TRIAL EXAMINER'S DECISION
and
REPORT ON OBJECTIONS TO ELECTION

This consolidated proceeding under Sections 9 and 10 of the National Labor Relations Act, as amended, hereinafter referred to as the "Act," came on to be heard

at Fort Worth, Texas on February 4, 1970, before the undersigned Trial Examiner. The petition in Case No. 16-RC-5277 had been filed by the above indicated Charging Party-Petitioner,[1] on or about August 20, 1969,[2] a Stipulation for Certification Upon Consent Election approved September 12, and an election in Case No. 16-RC-5277 conducted on October 31.[3] On November 5, the Union filed objections to conduct affecting the results of the election and on the same day filed the original charge of unfair labor practices herein, both filings relating to the alleged discriminatory discharge on October 10 of employee John S. Wilson, hereinafter referred to as "Wilson."[4] The complaint herein, issued December 24, alleged that the discharge of Wilson constituted an unfair labor practice within the scope of Section 8(a)(1) of the Act and consolidated the complaint and representation cases for purposes of hearing. The representation case also includes an objection to conduct affecting the results of the election based on the Company's preelection posting on a company bulletin board of a copy of the Company's letter to Wilson, dated October 10 and informing him of his discharge.

At the hearing the parties appeared and participated as noted above with full opportunity to present evidence and argument on the issues. Subsequent to the close of the hearing all parties filed written briefs which have been fully

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[1] Hereinafter sometimes referred to as the "Union."

[2] Dates hereinafter, unless otherwise indicated, relate to the calendar year 1969.

[3] Results of the election were as follows: Approximate number of eligible voters: 30; votes cast for the Union: 10; votes cast against the Union: 15; challenged ballots: 3.

[4] Additional objections to the election were withdrawn prior to the hearing

considered. On the entire record herein and on the basis of my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Company

The pleadings and evidence indicate and I find that the Company is a corporation organized and existing under and by virtue of the laws of the State of Texas and engaged at its facility in Dallas in the business of warehousing and storage of household goods and general merchandise. During the calendar year proceding issuance of the complaint herein, the Company derived gross revenue exceeding $50,000 from storage and handling of goods transported to its Dallas warehouse directly from points outside the State of Texas. Although the Company's answer to the complaint has denied that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, I find, as the Company has conceded in its stipulation respecting the election, that it is such an employer and that assertion of Board jurisdiction is warranted.

II. The Labor Organization Involved

The pleadings and evidence establish and I find that the Union is a labor organization within the purview of Section 2(5) of the Act.

III. The Unfair Labor Practices and the Objections to Conduct Affecting the Results of the Election

The Company's operations–transportation, packing and storage–have been carried on for at least 10 years. The work force at material times numbered about 35 and

worked under the supervision of Company Vice President Harold T. Cook and Dispatcher Wendell Fisk, each of whom is a supervisor within the meaning of Section 2(11) of the Act.

Wilson commenced working for the Company in February, 1960, as a leased operator using his own equipment, receiving a percentage of company revenue from his efforts and paying his own operating expenses; this arrangement continued until March 12, 1969, when Wilson, tired of driving, quit and ran his own nursery for a time until Fisk asked him and his wife to return to work for the Company as a man and wife packing team, an offer which they accepted and were paid starting May 27 at hourly rates of $2.25 and $2.05 respectively until his wife's layoff on September 20[5] and Wilson's transfer to driving and helping[6] where he remained until his termination on October 10.

Sometime about the middle of March[7] a dozen of the older company employees came to Wilson and asked him to start efforts to secure union representation. About August 1 Wilson communicated with the Union and thereafter secured signed authorization cards from three employees and urged others to attend union meetings. On August 19 the Union wrote the Company, claiming majority status in a unit numbering 35 employees, (General Counsel's Exhibit

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[5] The original charge herein also alleged the discriminatory layoff of Mrs. Wilson, an allegation not contained in the amended charge on which the Complaint herein issued.

[6] Wilson received a $2.40 rate for driving and, presumably, a somewhat lower rate as a helper.

[7] Since Wilson quit his leased operation set-up on March 12 it is not clear whether he was a leased operator or operating his nursery at the time of the inception of self-organization among company employees.

2) all of whom according to the undenied testimony of Wilson attended the first union meeting and signed "slips."[8]

On October 10 Wilson was assigned to unloading work and finished about 5 o'clock. He punched out and was called to the office by Fisk where he was given his letter of discharge signed by Cook and terminating him for threatening and intimidating employees. Wilson read it and said that he understood it. He, apparently, made no protest at the time. Shortly thereafter, and prior to the election, a copy of the discharge letter was posted on the company bulletin board. The letter states that Wilson was discharged for threatening other employees with loss of their jobs if they did not join the Union and for trying to force employees to join the Union in order to work for the Company. It also states that any employee may engage in lawful union activity but not in threats and intimidation.

Johnnie Davis, Sr., a warehouse packer and crater with 23 years service with the Company, testified that in the period prior to the election Wilson told him on three different occasions that if he did not join the Union he would have no job and that his new pickup would be splashed with paint. He testified that he reported these threats to Fisk. He also testified that the threats brought on nervousness and an ulcer for which he consulted a physician.

Mrs. Evelyn Jane McKim, a driver-packer whose husband had left her and their four children during the union campaign, testified that a week before his discharge, Wilson, who had asked her twice to sign for the Union and who knew of her husband's defection, asked her why she had failed to attend a union meeting and when she indicated

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[8] It is not clear whether these were authorization cards or mere attendance slips.

her lack of interest in the Union, told her that the Union was coming in to the Company, that no one would work with her and the Company would be forced to release her. She testified that she reported this threat to Fisk.

Jerry Thomas, who had told Wilson of his opposition to the Union, testified that 3 weeks before his discharge Wilson told him at work that if he did not vote for the Union the union members would sit down when he came to work and make things so hard for him that he would have to quit. He testified that he reported the latter conversation to Fisk.

Wilson generally denied threatening anyone and specifically denied the charges of Davis and McKim. I credit Wilson in his denials. His demeanor on the stand impressed me not only as that of a truthful witness but as one whose character would be totally inconsistent with the accusations leveled against him by the company witnesses. I do not believe their accounts of threats; to the contrary I credit his denials of impropriety in his solicitations for the Union.

There is no doubt that Wilson was the prime mover in bringing the union organizational effort into the warehouse and that he thereafter engaged in efforts to secure employee support for the Union. Neither can it be doubted that he thereafter solicited some employees to sign up for the Union and presented to others arguments in favor of union representation. Since he was discharged for alleged improprieties in his efforts on behalf of the union campaign and since, as I believe and find, he did not in fact engage in such improprieties, his discharge constituted an unfair labor practice within the scope of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21. The discharge and the posting of the notice thereof also constitute cause for setting aside the election conducted herein. *The National Heating Company*, 167 NLRB No. 73.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Company set forth in section III, above, and there found to constitute unfair labor practices, occurring in connection with the operations of the Company set forth in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof.

V. The Remedy

In view of the findings set forth above to the effect that the Company has engaged in unfair labor practices affecting commerce it will be recommended that it be required to cease and desist from such unfair labor practices and from like or related unfair labor practices, and to take such affirmative action, including the offer of reinstatement with backpay[9] to John S. Wilson and the posting of appropriate notices, as will effectuate the policies of the Act. It will be recommended that the election heretofore conducted in Case No. 16-RC-5277 be set aside, severed and remanded to the Regional Director for the conduct of a new election at such time as, in his judgment, the effects of the Company's unfair labor practices and interference with the conduct of the election of October 31 have been dissipated.

On the basis of the foregoing findings of fact and upon the entire record in this consolidated case I make the following:

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[9] Backpay shall be computed in accordance with the remedial relief principles of *F.W. Woolworth Co.*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employee John S. Wilson on the basis of participation in unlawful threats in the course of concerted activities whereas in fact no such unlawful threats were committed the Company has engaged in unfair labor practices within the scope of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

5. The unlawful discharge of John S. Wilson and the posting of notice thereof constituted interference with the election held herein and the election should be set aside and a new election conducted herein as above indicated.

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case it is recommended that the Company, its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Discharging or otherwise discriminating employees because of their participation in activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed under the Act.

2. Take the following affirmative action which appears necessary and appropriate to effectuate the policies of the Act:

(a) Offer John S. Wilson immediate and full reinstatement to his former or a substantially equivalent position and make him whole for loss of earnings as provided above in the section entitled "The Remedy."

(b) Preserve and upon request make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and give effect to the backpay requirements hereof.

(c) Post at its warehouse at Dallas, Texas, copies of the notice attached hereto and marked "Appendix."[10] Copies of said notice on forms provided by the Regional Director shall, after being duly signed by an authorized representative of the Company, be posted immediately

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[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

upon receipt thereof and maintained thereafter for a period of 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced or covered by other material.

(d) Notify the Regional Director in writing within 20[11] days from receipt of this Decision what steps have been taken to comply with the terms hereof.

It is further recommended that the election conducted herein on October 31 be set aside and that proceedings in Case No. 16-RC-5277 be remanded to the Regional Director for the conducting of a new election at such time as in his judgment circumstances will permit the free choice of employees respecting a collective-bargaining representative.

Dated at Washington, D.C.

/s/ William J. Brown
William J. Brown
Trial Examiner

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[11] In the event these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 16, in writing, within 10 days from receipt of this Order what steps the Respondent has taken to comply herewith."

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT DISCHARGE or in any way discriminate against employees because of their peaceful participation in organizational activities on behalf of TEAMSTERS LOCAL 745 or any other labor organization.

WE WILL OFFER JOHN S. WILSON IMMEDIATE AND FULL REINSTATEMENT to his former or a substantially equivalent position ad make him whole for lost wages by paying him backpay with interest.

ALL OUR EMPLOYEES are free to join or assist Teamsters Local 745 or any other labor organization of their own choosing.

GREAT SOUTHWEST WAREHOUSES, INC.
(Employer)

Dated By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Room 8A24 Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102 (Tel. No. 817-334-2921).

APPENDIX D

The provisions of the Administrative Procedure Act, 5 U.S.C. Sec. 557, 706, are as follows:

Section 557
Initial Decisions; Conclusiveness, Review by Agency; Submissions by Parties, Contents of Decisions; Record.

a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with Section 556 of this Title.

* * * * * * *

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions are a part of the record and shall include a statement of–

A. Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record; . . .

Section 706
Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–

* * * * * * *

(2) Hold unlawful and set aside agency action, findings, and conclusions found to be–

A. Arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law;

* * * * * * *

E. Unsupported by substantial evidence in a case subject to Sections 556 and 557 of this Title or otherwise reviewed on the record of an agency, hearing provided by statute; . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-440

GREAT SOUTHWEST WAREHOUSES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 443 F.2d 61. The Board's decision and order (Pet. App. C1-C15) are reported at 183 NLRB No. 75.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on June 2, 1971, and a petition for

rehearing was denied on June 29, 1971 (Pet. 2). The petition for a writ of certiorari was filed on September 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that employee Wilson did not engage in misconduct during organizational activity, and, therefore, that the company violated Section 8(a)(1) of the National Labor Relations Act by discharging him for that activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7 Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Sec. 8(a) It shall be an unfair, labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 7; * * *.

STATEMENT

A. The Board's Findings of Fact

John S. Wilson worked for the Company from 1960 until his discharge in October 1969, except for the period from March 12 to May 27, 1969, when he operated a business of his own (Pet. App. C8; A. 5-7).[1] In mid-March, 1969,[2] about a dozen Company employees told Wilson they were interested in starting a union. Wilson said he had belonged to a union once and that "it was a good deal if it was worked out right." (Pet. App. C8; A. 7-8.) About August 1, Wilson approached Local 745 of the Teamsters (the Union), and arranged for an organizational meeting (Pet. App. C8; A. 8-9). He subsequently secured signed authorization cards from three employees and urged others to attend union meetings (Pet. App. C8; A. 14-15). On August 19, the Union wrote the Company that it represented a majority of the Company's employees in an appropriate unit, and requested recognition (Pet. App. C8; A. 71). Thereafter, pursuant to a stipulation executed by the Company and the Union, a Board representation election was scheduled for October 13 (Pet. App. C3-C4).

On October 10, Company Dispatcher Fisk called Wilson to the Company office and handed him the following letter:

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[1] "A." refers to the appendix to the briefs in the court below.

[2] It is not clear whether this occurred during Wilson's employment with the Company or whether it occurred while he was operating his own business. See Pet. App. C8, n. 7.

> You are hereby discharged and your service terminated from this company because you have threatened and intimidated other employees with loss of their job if they did not join the Teamsters Union and attempted to force these employees to sign cards and join the union in order to work for this company.
>
> Anyone working for this company may engage in lawful union activity, but this company will not tolerate threats and intimidation directed to employees. [Pet. App. C9; A. 73-74.]

Wilson read the letter, stated that he understood it, and left the office (Pet. App. C9; A. 14). The Union thereafter filed an unfair labor practice charge with the Board (Pet. App. C6).

At the unfair labor practice hearing, three Company witnesses testified that Wilson had made threatening statements to them during his organizational efforts on behalf of the Union, and that they had reported his conduct to Dispatcher Fisk (Pet. App. C9-C10; A. 20-47, 48-57, 57-63).[3] Wilson, however, de-

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[3] Employee Johnnie Davis, Sr., testified that Wilson told him on three different occasions prior to the election that he would lose his job and that his new pickup truck would be destroyed if he did not join the Union (A. 21-22). Mrs. Evelyn McKim testified that Wilson advised her to "get on the ball because the Union was coming in, and [she] would be out" (A. 51). She testified further that Wilson warned her that "everybody else will sit down and make it so hard on you that [the Company] will have to fire you because nobody will work with you" (A. 51). Employee Jerry Thomas testified that Wilson warned him that Union members would "sit down" when he came to work and would "make it so hard on [him] that [he] would have to quit" (A. 60, 62).

nied ever having made the statements attributed to him or any other threats (A. 64-70). Based on his demeanor on the stand—which "impressed me not only as that of a truthful witness but as one whose character would be totally inconsisten with the accusations leveled against him"—the Trial Examiner credited Wilson's denials of impropriety in his solicitations for the Union (Pet. App. C10).

B. The Decisions Below

The Board adopted the Trial Examiner's finding that Wilson had not engaged in the improper conduct attributed to him by the Company's witnesses. Applying the principle of *National Labor Relations Board* v. *Burnup & Sims, Inc.*, 379 U.S. 21,[4] it held, in agreement with the Examiner, that, by discharging Wilson for alleged improprieties in his organizational efforts which in fact had not occurred, the Company violated Section 8(a)(1) of the Act. (Pet. App. C2, C10.) The Board ordered the Company to cease and desist from the unlawful conduct found, to offer Wilson reinstatement with backpay, and to post appropriate notices (Pet. App. C2, C12, C13). The court of appeals, in a *per curiam* decision, enforced the Board's order (Pet. App. A).

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[4] In *Burnup & Sims*, the Court held that an employer violates Section 8(a)(1) of the Act by discharging an employee engaging in activity protected by Section 7 even if he is motivated by the good faith, but mistaken, belief that the employee has engaged in misconduct which justifies the discharge.

ARGUMENT

Petitioner acknowledges (Pet. 3) that, if Wilson had not made the threats attributed to him by the Company's witnesses, his discharge violated Section 8(a)(1) under the principle of *Burnup & Sims, Inc.*, *supra*. The petition, then, involves only the question whether the Trial Examiner erred in crediting Wilson's testimony over that of the Company's witnesses. Such an evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the Trial Examiner acted within his authority in crediting Wilson on the basis of his impressive demeanor, even though Wilson, as a potential backpay recipient, had an interest in the outcome of the proceedings. See *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408.[5]

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[5] Petitioner's claim (Pet. 8) that a conflict exists between the Fifth and Sixth Circuits in the application of the substantial evidence standard is without merit. In *National Labor Relations Board* v. *Elia Bros. Big Boy, Inc.*, 327 F. 2d 421, 426-427, and *National Labor Relations Board* v. *Mt. Vernon Tel. Co.*, 352 F. 2d 977, 979-980, relied on by petitioner, the Sixth Circuit overturned credibility findings of the Trial Examiner not only because the witnesses in question were potential backpay recipients, but also because their testimony was found to be vague and evasive and they were specifically discredited with respect to other matters. The Fifth Circuit has acknowledged that "in a proper case the Court may decline to follow the action of the examiner in crediting and discrediting testimony * * *" (*National Labor Relations Board* v. *American Art Industries, Inc.*, 415 F. 2d 1223, 1227), but correctly concluded that this was not such a case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
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NORTON J. COME,
Assistant General Counsel,
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OCTOBER 1971.

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